No. 8129

# In the United States Circuit Court of Appeals for the Ninth Circuit

DOUGLAS L. EDMONDS, ADMINISTRATOR, ESTATE OF JOHN W. MITCHELL, DECEASED, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DOUGLAS L. EDMONDS, ADMINISTRATOR, ESTATE OF ADINA MITCHELL, DECEASED, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS*

## BRIEF FOR THE RESPONDENT

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*ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS*

## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The only previous opinion is that of the United States Board of Tax Appeals (R. 171–178), reported in 31 B. T. A. 962, and a memorandum and order of the Board entered July 9, 1935 (R. 196–199).

## JURISDICTION

This appeal involves income taxes for the years 1924, 1925, 1926, 1927, and 1928, and is taken from the decision of the Board of Tax Appeals entered July 29, 1935 (R. 199–200). Three petitions were filed with the Board of Tax Appeals, the first relating to the tax liability of John W. Mitchell for the year 1924 and part of 1925, up to the date of his death (R. 14). The second related to the tax liability of Adina Mitchell for part of the year 1925, and the years 1926, 1927, and 1928 (R. 23). The third concerned the tax liability of Adina Mitchell for the year 1925 (R. 43). The proceedings in the above were consolidated for hearing (R. 171). The case is brought to this Court by a petition for review filed October 18, 1936 (R. 202–222), pursuant to the provisions of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, Sections 1001–1003, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

## QUESTIONS PRESENTED

1. Whether John W. Mitchell and Adina Mitchell were joint tenants of certain property held for them in trust with the result that the income from such property was taxable one-half to each up to the date of the death of John W. Mitchell and thereafter the whole to Adina Mitchell as the survivor.

2. Whether under the circumstances of this case the principle of *res judicata* may be invoked to pre-

vent taxation of the income in question as that of Adina Mitchell.

3. Whether Adina Mitchell is entitled to recoupment against her income tax in a proceeding before the Board of Tax Appeals of an amount theretofore assessed and paid as an estate tax upon the estate of her husband, John W. Mitchell.

4. Whether penalties of 25 percent of the amounts of the taxes due from Adina Mitchell were properly assessable against her under Section 3176 of the Revised Statutes, for failure to file income tax returns for the years involved.

## STATUTES INVOLVED

The statutes involved herein will be found in the Appendix, *infra,* pp. 29, 30.

## STATEMENT

Three separate cases involving deficiencies for income taxes of John W. Mitchell and Adina Mitchell, both now deceased, were consolidated for hearing before the Board. They are (R. 200):

BOARD DOCKET No. 47516:

Deficiencies in income taxes from John W. Mitchell for the year 1924 and for 1925 until the date of his death, July 2, 1925.

BOARD DOCKET NOS. 70861 AND 66584:

Deficiencies in income taxes of Adina Mitchell for the years 1925, 1926, 1927, and 1928.

The facts as stipulated (R. 52–58), and as found by the Board of Tax Appeals (R. 170) may be summarized as follows:

John W. Mitchell and Adina Mitchell were married in Los Angeles, California, in 1888. Mrs. Mitchell had as her separate property the sum of $10,000, and a smaller sum later inherited, with which funds property at Vermont Avenue and Beverly Boulevard, Los Angeles, was purchased, title being taken in the name of Mrs. Mitchell (R. 52, 53).

Prior to March 1, 1913, John W. Mitchell purchased and took title to two parcels of real estate in or near Los Angeles (R. 53).

In 1915, the Los Angeles Trust and Savings Bank, having made large loans to Mr. Mitchell, demanded additional security therefor, and John W. Mitchell deeded the two above mentioned pieces of property to it. Mrs. Mitchell also deeded to the Los Angeles Trust and Savings Bank her Vermont Avenue property (R. 53).

In 1921, Mr. Mitchell arranged with one King C. Gillette to pay off a portion of his indebtedness to the Pacific Southwest Savings Bank, formerly the Los Angeles Trust and Savings Bank, and to secure the loan caused the Vermont Avenue property to be conveyed to the Title Guarantee and Trust Company in trust for himself and Gillette under a Declaration of Trust No. 750 (R. 53–54, 59–66). In the year 1922, to secure another loan, Mr. Mitchell

caused the Los Angeles Trust and Savings Bank to convey the two other parcels of real estate to the said Title Company, under Trust No. 822, under which Mitchell alone was beneficiary (R. 54, 66–80). A portion of the property included in Trust No. 822 had theretofore been held by the Title Company under Trust No. 807 (R. 71, 80).

In the year 1923, Mr. Mitchell authorized the Title Company to sell a portion of the property held in trust, title to which was conveyed to F. A. Hartwell, who, in consideration therefor, gave cash and two notes, payable to John W. Mitchell, secured by a deed of trust (R. 54).

The two Hartwell notes, together with a note of the Los Angeles Stone Company which was secured by Declaration of Trust No. 807 (R. 85) were also deposited by John W. Mitchell with the Title Company as collateral security for the payment of money then owing by him to it, which notes were held by the Title Guarantee and Trust Company on April 1, 1924, the day and date of Declaration of Trust No. 822B, and also during the taxable periods here in question (R. 55). These notes were found by the Board of Tax Appeals to be part of the aforesaid trust agreement (R. 174). Declaration of Trust No. 822B (R. 102–103) provided in part as follows:

> That whereas, Title Guarantee and Trust Company has heretofore issued its certain

Declarations of Trust #750, #807, and #822, respectively, and

* * * * *

Whereas it was the intention of John W. Mitchell and Adina Mitchell, his wife, that all of said properties should be held by them as joint tenants, with right of survivorship.

Now, therefore, this is to witness that Title Guarantee and Trust Company, at the request of John W. Mitchell and Adina Mitchell, his wife, declares that it holds the said Trusts and all assests thereof in Trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants, with right of survivorship, subject to all the terms of any assignment or assignments heretofore made to secure any indebtedness in favor of L. C. Brand, with additional provisions that the said Trusts shall also secure any indebtedness of the Title Guarantee and Trust Company, and further, the parties hereto hereby assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of properties covered by said Trusts, and in event of a default in the payment of any indebtedness in favor of L. C. Brand, or Title Guarantee and Trust Company, of any kind or nature, or for any purpose whatsoever, it is a provision hereof that the Trustee may sell the interests of John W. Mitchell and Adina Mitchell, his wife, in and to said Trusts or trust deeds as herein provided, and without the necessity of making de-

mand on the said parties, or the survivor thereof, which said sale shall be in the following manner, namely:

* * * * *

After the death of John W. Mitchell (July 2, 1925), Mrs. Mitchell, as executrix, filed a return for the decedent for the period January 1, to July 2, 1925, and as such executrix for subsequent income tax periods, to wit: July 3, 1925, to December 31, 1925, and for the years 1926, 1927, and 1928. No separate return was filed by Mrs. Mitchell for the year 1925 (R. 55), nor for the years 1926, 1927, and 1928 (R. 55–56).

An estate tax return was also filed for John W. Mitchell, upon which a stipulation of deficiency was entered into, amounting to $2,589.55 (R. 58).

In 1930, delinquent returns were prepared and filed by a deputy collector for Mrs. Mitchell (R. 55) without her knowledge or consent for the period July 2, to December 31, 1925, and for the years 1926, 1927, and 1928, on the theory that the income resulting during said taxable periods was the personal income of Mrs. Mitchell because of her right of survivorship and not the income of her husband's estate. Respondent then determined deficiencies in tax and penalties against Mrs. Mitchell for the years 1925 to 1928, inclusive. The Board of Tax Appeals affirmed the Commissioner's determination with some changes in the amounts involved.

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SUMMARY OF ARGUMENT

Declaration of Trust No. 822B, dated April 1, 1924, issued by the Title Guarantee and Trust Company, created a joint tenancy in John and Adina Mitchell, covering all properties, the income from which is here involved. During life each joint tenant was liable as such for Federal income taxes on his respective share. After the death of the one co-tenant, all income was thereafter taxable to the survivor, Adina Mitchell.

The doctrine of *res judicata,* set forth for the first time in petitioner's brief (p. 41), cannot now be made a question for determination here because its application was not pleaded nor raised before the Board of Tax Appeals in the present case, and because the question said to be *res judicata* was not, in fact, ever raised in any other action which would be dispositive of the issue now before us. Furthermore, even if the issue had been raised it could not now be made to apply, for the parties are not the same, and, lastly, it has been stipulated that the sums are taxable for the periods here involved (R. 56–57).

Recoupment cannot be allowed here under the theory of the case of *Bull* v. *United States,* 295 U. S. 247, and the opinion therein expressed is not applicable to the facts of the case at bar because the said case was an action equitable in nature, the parties were the same, the identical sum was subjected to both estate and income taxes, and the suit was

instituted in a forum having jurisdiction over the cause therein involved—all elements necessary to sustain petitioner's position, each of which is lacking here. The conclusions reached, therefore, in the *Bull* case have no application to the facts of the case at bar.

Section 3176 of the Revised Statutes, as amended, makes a penalty of 25 percent mandatory when any person fails to make and file a return. It is both necessary and proper for the administration of the tax laws. The statute admits of no exception or excuse for failure to so file.

## ARGUMENT

### I

**Declaration of trust no. 822B created a joint tenancy of all real and personal property conveyed to Title Guarantee and Trust Company. Joint tenants are assessable each for 50 percent of the income and on the death of one co-tenant, the survivor is liable for the whole**

#### A

It is to be noted that Docket No. 47516 involves income taxes one one-half of the income stipulated to have been realized prior to the date of John W. Mitchell's death, July 2, 1925 (R. 56, 57). No argument is advanced by the petitioner concerning the Board's finding that one-half of the income for this period was taxable to him (R. 200). It would seem, therefore, that the appeal of this taxpayer is abandoned. Then too, in said taxpayer's appeal to the Board, it is alleged that Mr. Mitchell caused

to have his interests in the trust herein involved assigned "to himself and wife as joint tenants with right of survivorship" (R. 16). Hence, it is apparent that by taxpayer's own allegation, one-half of the distributive income from such trusts was taxable to decedent during his lifetime, and the other half to taxpayer, Adina Mitchell, to whose interest the petitioner's brief is exclusively devoted. Cf. *Bull* v. *United States,* 295 U. S. 247.

B

Petitioner contends that Declaration of Trust No. 822B did not create a joint tenacy in John W. Mitchell and Adina Mitchell. We submit that the Board correctly held that such a tenancy was created. The instrument, itself, in unmistakable language, declares that the Title Guarantee and Trust Company, as trustee, holds all the assets formerly held by it for the benefit of John W. Mitchell, in trust for the said John W. Mitchell and Adina Mitchell, as joint tenants. This trust agreement provided in part (R. 102–103):

> That whereas, Title Guarantee and Trust Company has heretofore issued its certain Declarations of Trust #750, #807, and #822 respectively, * * *.
>
> Whereas it was the intention of John W. Mitchell and Adina Mitchell, his wife, that all of said properties should be held by them as joint tenants, with right of survivorship.
>
> Now therefore * * * Title Guarantee and Trust Company * * * declares that it holds the said Trusts and all assets thereof

> in Trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants, * * * subject to all the terms of any assignment or assignments * * * and further, the parties * * * assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of properties covered by said Trusts, and in event of a default * * * the Trustee may sell the interests of John W. Mitchell and Adina Mitchell * * * without the necessity of making demand on the said parties, or the survivor thereof * * *.

There is here no question concerning the present or past intention of the parties to create a joint tenancy. Intention has always been given great weight and in many instances, where an equitable estate was created it has been held to be conclusive. *Erwin* v. *Felter,* 283 Ill. 36, 119 N. E. 926; *Perry* v. *Leveroni,* 252 Mass. 390, 147 N. E. 826; *N. J. Title Guar. & Trust Co.* v. *Archibald,* 91 N. J. Eq. 82, 108 Atl. 434; *Blick* v. *Cockins,* 252 Pa. 56, 97 Atl. 125; *Kennedy* v. *McMurray,* 169 Cal. 287; *Conneally* v. *San Francisco S. & L. Soc.,* 70 Cal. App. 180, 232 Pac. 755. Since early history, the cardinal rule in interpreting conveyances has been that every such conveyance should be construed to give effect to the intent of the parties. *Walker* v. *Grogan,* 283 Fed. 530 (E. D. Mich.); *Ames* v. *Chandler,* 265 Mass. 428.

In order to create a joint estate there must be unity, which is four-fold: unity of interest, unity of title, unity of time, and unity of possession. *Siberell* v. *Siberell,* 214 Cal. 767; *DeWitt* v. *San Francisco,* 2 Cal. 289; *Furman* v. *Brewer,* 38 Cal. App. 687; *Colson* v. *Baker,* 87 N. Y. S. 238. It is submitted that all four of these unities were present in the case at bar (R. 197), for: first, the interest of John W. Mitchell and Adina Mitchell was equal—they both had like estates (R. 103); second, the estate of joint tenancy was created by the same instrument (R. 102); third, the estate in joint tenancy arose in each at the same time (R. 102); and, fourth, each joint tenant had title to the whole (R. 103).

All the real property owned by John W. Mitchell and Adina Mitchell was, prior to April 1, 1924, conveyed first to The Pacific Southwest Savings Bank, formerly The Los Angeles Trust and Savings Bank, and then by it to the Title Guarantee and Trust Company, which held the property as security for loans in trust for John W. Mitchell. The Title Company, at the direction of John W. Mitchell, sold a portion of the real property, for which notes and other evidences of security were taken in Mitchell's name. These notes (the Hartwell and Los Angeles Stone Company notes) were in turn deposited with the Title Company and held by it as security for loans previously made to John W. Mitchell, so that on the date Trust Agreement

No. 822B was executed, legal title to all the property here in question was in the name of the Title Guarantee and Trust Company (R. 55, 193, 197).

Thereafter, and at the request of John W. Mitchell, a new trust agreement was executed, to wit: No. 822B (R. 102–105), which, in effect, blanketed all previous trusts executed by the Title Company to Mr. Mitchell. This instrument changed the beneficial interest of all the previous trust agreements from John W. Mitchell to himself and his wife, Adina Mitchell, in accordance with the prior intention of the parties, which was, as stated in Trust No. 822B, the original intention of the parties when the properties were first transferred to the trustee (R. 16, 102), thereby creating a joint tenancy in the Mitchells. It can thus be seen that title to both the real and personal property was not in the name of John W. Mitchell but in the Title Guarantee and Trust Company at the time the estate in joint tenancy was created. Here there was no need to resort to a dummy assignment or any other indirect or circuitous route to effect the desire of the parties. The legal title rested in the name of the Title Company, which, at the request of the beneficiary, changed the use therein back to the original grantors, Mr. and Mrs. Mitchell. This change, therefore, has no analogy to those instances where a grantor, in whom the fee resided, attempted to carve a legal estate out of such fee in himself and another, but was simply the creation

of an equitable joint tenancy out of property already held by a third party (R. 103, 198).

Petitioner cites cases where no such third party is involved. *Breitenbach* v. *Schoen,* 183 Wis. 589, 198 N. W. 622; and *Deslauriers* v. *Senesac,* 331 Ill. 437, 163 N. E. 327. We submit these cases have no application here. There is no California case determining this precise question, but there is, however, ample authority holding contrary to the cases cited by petitioner. *Lawton* v. *Lawton,* 48 R. I. 134, 136 Atl. 241; *Ames* v. *Chandler,* 265 Mass. 428, 164 N. E. 616; *Colson* v. *Baker,* 87 N. Y. S. 238; *Saxon* v. *Saxon,* 93 N. Y. S. 191; *Matter of Klatzl,* 216 N. Y. 87; *In re Horler's Estate,* 168 N. Y. S. 221.

Furthermore, a distinction must be made between the creation of a legal joint tenancy and an equitable joint tenancy, where the conveyance is made in trust to the use of the grantor and another. In the latter instance the conveyance has been held to create a joint tenancy in the use for the benefit of such grantor and another, even where there had been no intervention of a third party and the grant was made direct to the grantor and another. *Brent's case,* 3 Dyer 340, 73 Reprint 766. See also *Kenworthy* v. *Ward,* 11 Hare 202; *Sussex* v. *Temple,* 91 Reprint 1102. In the case of *Colson* v. *Baker, supra,* the court reviewed the early common law principles of estates in joint tenancy and there said (pp. 239–240):

Now, let us suppose that a man has an estate in fee simple, and desires to convey away the fee, and by the same instrument create in himself an estate for years. That this can be done, see *Casey* v. *Buttolph,* 12 Barb. 637; *Culbreth* v. *Smith,* 69 Md. 450, 16 Atl. 112, 1 L. R. A. 538.

In this instance the estate for years and that in fee, subject to the estate for years, would be created by the same act or instrument, although the grantor originally was seized in fee. By his one act he has carved out of his fee a term of years, and a fee limited thereon, and both existed or came into being at the same time. Likewise, out of his fee, he may by direct conveyance, create a tenancy in common for himself and another. His fee is reduced or lessened just so much, but it becomes a tenancy in common by the same act and at the same time. When, therefore, he attempts to create for himself and his grantee an estate in joint tenancy out of his fee by a direct deed to the grantee, why does not the joint tenancy arise at the same time and by the same act? I think it does. Of course, each joint tenant has the same interest by such a deed, and each is in possession of the whole like tenants in common.

In all references to the "four unities" requisite to create a joint tenancy, I find nothing that prevents their existence or creation by the act of the grantor for himself and another as well as by his act for two

other persons. In Thomas' Coke on Littleton (vol. I, p. 732), it is stated: "If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry for the term of their lives and after he taketh a wife, they are joint tenants; and yet they come to their estates at several times"—citing *Brent's* case, 3 Dyer, 340. Here the joint tenancy in the use is created by the act of the feoffor for himself and another. If this were an exception to the general rule, or peculiar to husband and wife, or the law of uses, some mention would be made of it by Coke or Blackstone, as it is cited in the chapter on joint tenancy. While it is true that joint tenancy is no longer favored as at common law, yet it still exists when by grant it is expressly declared that the estate is to be a joint tenancy. Real Property Law, art. 2, § 56, Laws 1896, p. 569, c. 547. *Murphy* v. *Whitney*, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123, recognizes the right of coowners to agree among themselves to hold the property as joint tenants, or so that the survivor would take the entire fee. If, therefore, a tenant in common may thus agree with his co-tenant, why may not the owner of the fee likewise agree with his grantee to whom he has conveyed an undivided half?

It being conceded that the intent to create a joint tenancy in Mary Ann Baker and Johanna Baker is clear and distinct, and that it could have been accomplished by a con-

> veyance through a dummy, a third party, I see no reason for insisting upon such circuitousness, but I think it was so created by the deed of Mary and Elizabeth to Mary and Johanna, and that, Johanna having died, Mary took the entire fee by survivorship.

Petitioner contends that the personal property, consisting of the two Hartwell notes and the note of the Los Angeles Stone Company, was not placed in joint tenancy by Declaration of Trust No. 822B (Br. 36). We submit that such notes were part of the aforesaid trust. On the date the said trust was executed, April 1, 1924, the Title Guarantee and Trust Company had legal title to all the property here in question belonging to the Mitchells under Trusts Nos. 750, 822, and 807 (R. 59, 66, 80). Thereafter, part of the property was sold and the said notes and other evidences of security were taken in exchange therefor (R. 54), which were, in turn, deposited with the Title Company as collateral security (R. 55), along with property not disposed of. By Trust Agreement No. 822B it was provided, among other things, that the Title Company "holds the said Trusts and all assets thereof in Trust for John W. Mitchell and Adina Mitchell" (R. 103). A clear construction of the use of the words "all the assets" can mean only one thing, and that was the assets held by the Title Company in trust for the benefit of John W. Mitchell before April 1, 1924, and thereafter held by it in trust for both John W. Mitchell and his co-tenant, Adina

Mitchell. But such assets were not to be free of previous encumbrances, so it was provided that the property held in joint tenancy was to be subject "to all the terms of any assignment or assignments heretofore made" (R. 103). This latter provision was merely a restatement of what John W. Mitchell had previously agreed to.

John W. Mitchell and Adina Mitchell further agreed to the assignment of all the notes already held by the Title Company, which were "given as part of the purchase price on the sale of properties covered by said Trusts" (R. 103), so that in the event of default in the loans made by the Title Company to John W. Mitchell, the present trust agreement (No. 822B) would provide the authority and basis upon which the said trustee "may sell the interests of John W. Mitchell and Adina Mitchell, his wife, in and to said Trusts or trust deeds * * *, without the necessity of making demand on the said parties, or the survivor thereof" (R. 103). To say that the aforesaid notes were to be excluded from the estate thus created would be placing an erroneous construction on the clear terms of the aforesaid trust and would further conflict with that part of the agreement which provided that, "it was the intention of John W. Mitchell and Adina Mitchell, his wife, that all of said properties should be held by them as joint tenants, with right of survivorship" (R. 102).

It seems, therefore, that the Board's finding to the effect that a joint tenancy was created by the

aforesaid agreement of all property, both real and personal, assigned to or held by the Title Guarantee and Trust Company on or before April 1, 1924, was correct and should be sustained (R. 176, 177).

A joint tenancy having been created, Adina Mitchell, as survivor, was the beneficial owner of the whole after John W. Mitchell's death and taxable on the distributable income stipulated to have been derived.

## II

### The doctrine of res judicata is not involved here, nor can recoupment be had in this proceeding

The petitioner contends (Br. 41) that the property involved here was by agreement corpus of the estate of John W. Mitchell under Board Docket No. 36231, and the said Board having rendered its decision to such effect the respondent here is estopped from taxing, under the principle of *res judicata,* it thereafter as income to Adina Mitchell. We submit that this contention is erroneous; that, on the contrary, there is no room here for the application of the doctrine of *res judicata* for several reasons. First, its application was not pleaded nor raised before the Board of Tax Appeals in the present proceeding; second, because the record does not show that the question whether the notes were corpus of the estate was in issue before the Board or decided by that body in the former case, but, on the contrary, the facts appearing of record here indicate that such issue was not presented; third,

even if the issue had been raised and adjudicated, the doctrine would still not apply, for the parties are not the same; and, fourth, it has been stipulated in the present case that the sums are taxable income for the periods involved (R. 56–57). In the case of *Suhr* v. *Commissioner,* 4 B. T. A. 1198, the Board said (p. 1200):

> Stating the rule generally, it is that in order to render a matter *res adjudicata* there must be identity of the thing sued for, identity of the cause of action, and identity of the parties in the character in which they are litigants. *Washington, etc., Steam-Packet Co.* v. *Sickles,* 24 How. 333, 341, 342; *Lyon* v. *Perin & Gaff Mfg. Co.,* 125 U. S. 698, 700. That identity of the parties is essential is settled by *Aspden* v. *Nixon,* 4 How. 467, * * *.

An examination of the record fails to disclose wherein the doctrine of *res judicata* was ever pleaded or raised. Its application was in fact raised in petitioner's brief (B. 41) for the first time. The precise point, therefore, never having been brought to the attention of the Board of Tax Appeals, the petitioner is now barred from raising the question here for the consideration of this Court. A similar situation was present in the case of *Kottemann* v. *Commissioner,* 81 F. 2d) 621, where this Court said (p. 623):

> It is a fundamental rule of federal appellate procedure that only such points as are made in the court below or such questions as are

> there raised will be reviewed on appeal; and, unless the questions or points have been presented to the court below, they are not before this court for review. * * *
>
> This rule is followed in cases coming to the Circuit Court of Appeals from the Board of Tax Appeals. *Jeffery* v. *Commissioner,* 62 F. (2d) 661 (C. C. A. 6); * * *

The record further does not disclose that the notes from which the income was derived were ever in issue before the Board, either as income of Adina Mitchell or corpus of the estate of John W. Mitchell. The few facts set forth therein are indicative of the conclusion that the parties were not at odds on this question. A stipulation referred to by petitioner for the first time in his brief (Br. 41), as having been entered in Board Docket 36231, was a stipulation of a deficiency on estate taxes for decedent, John W. Mitchell, and was not a stipulation that any particular notes were corpus of decedent's estate. Such former decision, however, having been neither pleaded nor introduced in evidence, and it being asserted for the first time in a brief filed by counsel, that such decision was *res judicata* of the facts pleaded in the case at bar, cannot now be made a question for determination by this Court. *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9th); *Kottemann* v. *Commissioner, supra*; *Reserve Natural Gas Co. of Louisiana* v. *Commissioner,* 15 B. T. A. 951.

As stated in the case of *Suhr* v. *Commissioner, supra,* set forth above, "in order to render a matter *res adjudicata* there must be identity of the parties in the character in which they are litigants." It is essential that the parties be the same. In the present case the parties are not the same, for here the issue concerns income taxes for Adina Mitchell, while the party involved in Board Docket 36231 was the estate of John W. Mitchell over an issue of estate taxes. In *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620, the Court said (p. 623):

> The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand. * * *

Notwithstanding that the doctrine of *res judicata* does not apply to the facts of the present case for the reasons enumerated above, it would still not be applicable because it has been stipulated that the sums here involved are taxable income for the periods involved (R. 56–57).

Furthermore, even if all the above requirements had been met so that under the principle of *res judicata* the notes here involved constituted part of John W. Mitchell's gross estate for estate tax purposes, nevertheless, the income derived from their payment was taxable to Adina Mitchell when the notes were paid. In fact, stipulation as to the value of property properly includable in the gross estate as a measure of estate taxes, in no way precludes the inclusion of the property in the income

of decedent prior to his death, or to another after his death. The value of property held by entirety or joint tenancy is includable in gross estate for estate tax purposes of the tenant first deceased, to the extent furnished by decedent for less than full consideration. *Tyler* v. *United States,* 281 U. S. 497; *O'Shaughnessy* v. *Commissioner,* 60 F. (2d) 235 (C. C. A. 6th), certiorari denied, 288 U. S. 605; *Phillips* v. *Dime Trust & S. D. Co.,* 284 U. S. 160. The income from such estate in entirety or joint tenancy is likewise taxable to the survivor on the same basis as in the hands of the donor decedent. *Lang* v. *Commissioner,* 289 U. S. 109. In that case the court below said in its opinion affirming the Board of Tax Appeals (61 F. (2d) 280, 283 (C. C. A. 4th)):

> The two taxes differ in kind and in incidence, and, as was said by the Board in its decision, "fall on different persons; the estate tax on decedent's estate, and the income tax on the petitioner."

B

Petitioner contends (Br. 51) that under the recent decisions of the Supreme Court of the United States in *Bull* v. *United States,* 295 U. S. 247, if Adina Mitchell is liable for income tax, the amount of estate tax assessed and paid against the same property should be allowed as an offset. Recoupment was permitted in the *Bull* case only because the action was equitable in nature, the parties were

the same, and the identical sum was subjected to both estate and income taxes, the suit was instituted in the proper court and the question properly raised therein, elements necessary to sustain petitioner's position, each of which is lacking here.

Recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. *Bull* v. *United States, supra.* It is an equitable remedy and if raised under proper circumstances would no doubt be allowed, but the facts and the forum upon which the taxpayer here seeks to invoke such remedy do not afford such circumstances. The jurisdiction of the Board of Tax Appeals is statutory and its authority must be expressly authorized or found to exist by necessary implication in the specific language of the Act creating it. Nowhere in the statutes creating the Board, or by later statutes, has Congress invested the Board with power to allow a set-off or a refund of taxes, where, as under the facts now before us, the claim is based upon an entirely different tax and for wholly different years. On the contrary, the jurisdiction of the Board has been specifically limited with respect to the particular taxes for the particular year or years before it by Section 274 (g) of the Revenue Act of 1926. That section provides:

> The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly

> to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

It necessarily follows that if the tax on the estate of John W. Mitchell was overpaid, as the petitioner here must maintain, a credit therefor cannot be allowed in the present proceeding which was not instituted for a redetermination of the estate tax. No doubt an action for that purpose could be maintained in other forums, empowered to hear and determine the cause, but the Board is not such a forum. The Board has jurisdiction only to review the correctness of a proposed deficiency asserted for the taxable year before it and to determine whether there is a deficiency and overpayment for the same year. It cannot determine that a tax for any year, other than the one or ones involving the deficiency, has been underpaid or overpaid (R. 198). *Hazzard* v. *Commissioner,* 4 B. T. A. 150; *Boyer Co.* v. *Commissioner,* 4 B. T. A. 180; *Bruin Coal Co.* v. *Commissioner,* 1 B. T. A. 83; *Harris* v. *Commissioner,* 2 B. T. A. 933.

Even if the Board did have the power, the doctrine of recoupment is still not applicable here because the parties and the transaction are not the same. 40 Am. Dec. 322; Ann. Cases, 1914 B, p. 119.

In the *Bull* case cited by petitioner the Court found that the executor paid an estate tax on a right accruing to the estate, which right the Com-

missioner valued for estate tax purposes in an amount paid to the estate as income, which the Commissioner treated as part of the corpus of the estate, and a few years later the same executor was made to pay a deficiency tax upon the same profits as income to the estate. The situation and facts there presented are not analogous to those of the case at bar. The conclusions reached, therefore, in the *Bull* case with reference to recoupment are not, for the reasons stated, applicable here.

## III

### A penalty is mandatory under section 3176, Revised Statutes

Section 3176 of the Revised Statutes, as amended, *infra,* p. 29, clearly and explicitly provides that if any person fails to make and file a return or list at the time prescribed by law, the Commissioner shall add to the tax due 25 percent of its amount. The statute is necessary for a proper administration of the tax laws, and in terms admits of no exception or no excuse for a failure to so file.

In the case at bar, the taxpayer did not file any return for the years 1925 to 1928, inclusive. Thereupon, the Commissioner under the provisions of Section 3176, Revised Statutes, filed delinquent returns for the said periods. Since, therefore, no returns were filed by the taxpayer, it was mandatory upon the Commissioner to assess the penalty provided under the statutes, regardless of the fact that such failure to file might have been due to a

reasonable cause and not to wilful neglect. *Scranton-Lackawanna T. Co.* v. *Commissioner,* 80 F. (2d) 519 (C. C. A. 3d), affirming a decision of the Board of Tax Appeals, 29 B. T. A. 698, certiorari denied, 297 U. S. 723. The court there said (pp. 519–520):

> Although we are constrained by the statute in question to place the penalty on the taxpayer for failure to file a tax return even where the outcome shows she was not taxable for income on the item in dispute, we deem it proper to say that any relief for her is beyond our power, and if relief is to be granted to her, it can only come through Congress.

See also *Beam* v. *Hamilton,* 289 Fed. 9 (C. C. A. 6th); *Green* v. *Commissioner,* 24 B. T. A. 1121; *Black Diamond Oil Trust* v. *Commissioner,* 25 B. T. A. 142; *Employees Loan Ass'n* v. *Commissioner,* 27 B. T. A. 945.

Petitioner states (Br. 24) that through inadvertence a mistake in computation was included in the stipulation of facts. The Board of Tax Appeals rendered its opinion without having had such fact brought before it, and the Board's opinion does not deal with such subject matter. Petitioner, nevertheless, had the opportunity to call this to the Board's attention in its motion for rehearing (R. 183–196), but failed to do so. The petitioner cannot now complain of his error to properly correct the record, if, indeed, it needed correcting.

CONCLUSION

The decision of the Board of Tax Appeals is in accord with the law and should be affirmed.

Respectfully submitted.

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NOVEMBER 1936.

## APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1921, there shall be levied, collected, and paid for each taxable year upon the net income of every individual * * *;

Section 210 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Section 11 of the Revenue Act of 1928, c. 852, 45 Stat. 791, contain similar provisions to Section 210 (a) of the Revenue Act of 1924.

Revised Statutes, as amended by Section 1103 of the Revenue Act of 1926, and by Section 619 of the Revenue Act of 1928:

> SEC. 3176. If any person, corporation, company, or association fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner of Internal Revenue may, from his own knowledge and from such information as he can obtain through testimony or otherwise, make a return or amend any return made by a collector or deputy collector. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

If the failure to file a return (other than a return of income tax) or a list is due to sickness or absence, the collector may allow such further time, not exceeding 30 days, for making and filing the return or list as he deems proper.

The Commissioner of Internal Revenue shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax (U. S. C., Title 26, Secs. 1512, 1524).

California Civil Code, 1872, p. 161:

683. A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.

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